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No. 05-381

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE AT&T INC., BELLSOUTH CORPORATION, GENERAL ELECTRIC COMPANY, QWEST COMMUNICATIONS INTERNATIONAL INC., AND VERIZON COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in approving an instruction that enabled a jury to subject a company to antitrust liability by finding that the company purchased more raw materials "than it needed" from upstream suppliers or paid a higher price for those materials "than necessary, in order to prevent [rivals] from obtaining the [materials] they needed at a fair price."

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INTEREST OF AMICI[1]

Amici submit this brief to express their concern that, like the Ninth Circuit here, many lower courts disregard the need for objective standards in antitrust law generally, particularly as formulated in jury instructions. The lack of such standards makes the outcome of antitrust litigation unpre-

[1] This brief was prepared in its entirety by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae and their counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

dictable, makes antitrust advice little more than guesswork, probably skews the results of antitrust litigation against defendants, and, perhaps most important, requires firms such as amici to err inefficiently on the side of caution in their business affairs lest they face antitrust liability for efficient, pro-consumer business conduct. Amici urge the Court to address these concerns by requiring antitrust courts to use objective standards rather than undefined buzzwords in their legal analysis and jury instructions.

SUMMARY OF ARGUMENT

I. The Ninth Circuit held below that a market "middleman" may be subject to treble damages for aggressive buying conduct in an upstream input market even if that conduct does not meet this Court's *Brooke Group* test for predatory pricing—that is, even if the defendant's sales of finished products in the downstream market cover its costs, and even if the defendant would be unable in any event to recoup any losses over the long term. The Ninth Circuit sought to distinguish *Brooke Group* on the ground that a defendant that "buys too much" or "pays too much" on the buying side does not thereby produce the immediate consumer benefits that a defendant creates when it cuts prices on the selling side. But that is a distinction without a difference. A basic purpose of the antitrust laws is to promote allocative efficiency: *i.e.*, the efficient allocation of resources to their most highly valued uses. The consumer benefits from an above-cost price cut in a retail market represent one benefit of allocative efficiency, but so do the benefits that input providers derive from a large but non-money-losing bid from an intermediary buyer. Both have the immediate effect of expanding output. In each case, total welfare and the long-run interests of consumers are best served by leaving resource allocation questions to the free play of market forces.

The Ninth Circuit's rejection of *Brooke Group* principles in this case has the perverse effect of thwarting key antitrust objectives. Under that court's approach, a defendant in Weyerhaeuser's position that uses all the inputs it buys

can avoid liability only by buying less and therefore reducing its sales of the finished products. Antitrust, however, favors efficient *increases* in output, as long as prices do not fall below cost. The Ninth Circuit's approach turns that objective on its head.

II. Quite apart from the Ninth Circuit's erroneous rejection of the *Brooke Group* standards, the court further erred in upholding a jury instruction that contained no standards of any kind to guide the jury's discretion. That instruction permits a jury to hold a company liable under Section 2 if it finds that the company purchased more raw materials "than it *needed*" from upstream suppliers or paid a higher price for those materials "than *necessary*, in order to prevent the Plaintiffs from obtaining the [materials] they needed at a *fair* price." Pet. App. 7a n.8 (emphasis added). Those undefined terms have no objective content.

As this Court has emphasized, antitrust liability for single-firm conduct must be delimited by clear rules, lest the prospect of such liability deter economically efficient behavior. The Ninth Circuit's reliance here on juror intuitions about "fairness" flies in the face of that precedent. Unfortunately, the Ninth Circuit is not alone; other courts of appeals have likewise upheld jury verdicts in favor of antitrust plaintiffs on the basis of instructions predicating antitrust liability for whatever single-firm business conduct strikes a jury as too hard on particular competitors. This Court should take this opportunity to reaffirm that antitrust instructions must give juries objective, determinate standards to apply, and must not contain undefined terms such as "too much," "more than necessary," or "unfair."

ARGUMENT

Antitrust commentators have lamented the absence of an objective, generally applicable standard for defining unlawful "monopolization" under Section 2 of the Sherman

Act.[2] But this Court *has* adopted an objective test that must be met before a firm's unilateral price decisions can be regarded as anticompetitive.[3] In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court ruled that, because price reductions generally benefit consumers, they should be deemed anticompetitive only when they entail short-term losses combined with a dangerous probability of subsequent recoupment through monopoly profits. That test, which objectively measures both short-term pricing decisions and long-term market conditions, can be readily understood and successfully applied by the bar, the business community, the bench, and—when the test is properly defined and articulated—a lay jury. A key strength of the *Brooke Group* rule is that it uses objective standards to assess conduct that, because it is labeled "predatory," would otherwise invite the type of subjective considerations that are irrelevant to sound antitrust analysis.[4]

In this case, the Ninth Circuit rejected both the rule and the rationale of *Brooke Group* on the ground that this case involves buy-side conduct instead of the sell-side behavior analyzed in *Brooke Group* itself. As we explain in Point I below, however, the antitrust policies underlying *Brooke Group* are just as applicable in this buy-side case as they

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[2] *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 255 (2003); Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. Chi. L. Rev. 49, 58 (2005).

[3] *See, e.g.*, Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 147-148 (2005). This case does not present, and amici do not address, the other factors that may preclude antitrust liability even where *Brooke Group's* conditions are met.

[4] "Antitrust is not concerned with ethical or community standards of conduct, but only with whether the conduct is anticompetitive—that is, whether it tends toward reduced innovation or reduced output and higher prices in some market. These are fundamentally objective rather than subjective inquiries." Herbert Hovenkamp, *The Antitrust Enterprise* 51 (2005).

were in that sell-side case. Moreover, as we explain in Point II below, regardless whether the Ninth Circuit was correct not to apply *Brooke Group*'s bright-line test in this case, it still erred in approving jury instructions containing vacuous terms that cannot be applied objectively.

I. THE NINTH CIRCUIT'S ANALYSIS IS ECONOMICALLY INCOHERENT

In *Brooke Group*, this Court adopted a bright-line principle to govern antitrust claims concerning a defendant's unilateral decisions about price and quantity. The Court held that a monopolist cannot be held liable for charging buyers too little for goods or services unless the plaintiff proves (i) "that the prices complained of are below an appropriate measure of [the defendant's] costs" and (ii) that the defendant has "a dangerous probability . . . of recouping its investment in below-cost prices." 509 U.S. at 222, 224. When a price cut does not satisfy both of these criteria, the Court concluded, it should remain lawful because it "either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Id.* at 223.

The animating principle of *Brooke Group* is that antitrust rules concerning unilateral decisions about price and quantity should be drawn narrowly enough to preserve every firm's incentives to compete vigorously with its rivals by, among other things, expanding output to the benefit of its trading partners. In *Brooke Group* itself, this Court applied that principle to protect a larger firm from antitrust liability when it competed against smaller firms by lowering prices and increasing output. But it is no less important to protect a large firm's ability to compete against its rivals to the benefit of its trading partners when it *bids for inputs*, whether in the form of talented employees, research and development of new technologies, or (as here) raw materials. In each case, it would defeat the purpose of the antitrust

laws to suppress competition, reduce output, and disadvantage the trading partners in order to protect unhappy competitors. To that general principle, *Brooke Group* permits only one exception: where the dominant firm conducts its transactions at a loss in order to exclude its rivals *and* enjoys a "dangerous probability" of recouping that loss to the long-run *detriment* of its trading partners. *Id.* at 222, 224. That general principle, and its one possible exception, apply as much to buying as to selling.

The Ninth Circuit deemed *Brooke Group* inapplicable to claims of predatory bidding principally because the court concluded that "excessive" purchases from an input supplier do not generate the immediate consumer surplus produced when a monopolist cuts prices in a retail market. Because this Court cited that consumer benefit as a benefit of its rule constraining antitrust liability for price cuts, 509 U.S. at 223-224, 226-227, the Ninth Circuit concluded that no such rule could be appropriate in the absence of that benefit, *see* Pet. App. 8a-9a.[5] This analysis is flawed for two basic reasons.

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[5] The Ninth Circuit recognized that high input prices might sometimes induce new entry and thus benefit consumers "in the long run," but it asserted that "this is not such a situation" because the supply of alder sawlogs is "relatively inelastic." Pet. App. 11a. Even if there were record evidence to support that assertion, *but see* Pet. 17 n.7, the jury was never instructed to make any such finding. In any event, the court's extra-record speculation could not support the conclusion that application of the *Brooke Group* rule here would provide no consumer benefits. For example, the court ignored the prospect of efficient competitive responses other than an increase in the supply of alder sawlogs, such as an increased supply of substitutes for alder sawlogs and increased productive efficiency by rivals. Moreover, it would be impracticable to administer a rule—on either the buy-side or the sell-side—under which a firm can be found to have violated the antitrust laws for engaging in profitable competition if it fails to prove that consumers benefited specifically from its conduct. *See Brooke Group*, 509 U.S. at 223; Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 976-977 (1986) ("To require the defendant to show that its conduct is efficient is to hand victory to the plaintiff in a large number of cases no matter whether the defendant's conduct helped or harmed consumers.").

First: The Ninth Circuit's focus on immediate consumer benefits confuses means with ends. The fundamental objective of antitrust is the promotion of economic welfare through allocative efficiency: the efficient allocation of scarce resources to their most highly valued uses. The systematic pursuit of that objective benefits the economy—and thus consumers—over the long term. But wealth redistribution in favor of consumers is not an antitrust end in itself. Accordingly, the authorities describing the economic benefits of antitrust law in general, and the *Brooke Group* rule in particular, confirm that the purpose of antitrust is to promote the efficiency of the market as a whole and to prohibit *only* conduct that interferes with that purpose.[6] Although these authorities sometimes refer to "consumer welfare," they generally do so as shorthand for the principle that antitrust should promote the interests of competition rather than particular competitors. *E.g.*, Robert H. Bork, *The Antitrust Paradox* 427 (1993 ed.) (the purpose of antitrust is "the maximization of consumer welfare, or if you prefer, economic efficiency").

Indeed, if important antitrust principles like the *Brooke Group* rule applied only where they operated to benefit consumers in the short run, they would be inapplicable even to most conventional sell-side cases. The typical buyers in such cases, such as the wholesaler purchasers that benefited from the price cuts in *Brooke Group* itself, are themselves corporate intermediaries. *See, e.g.*, *Brooke Group*, 509 U.S. at 231-232. But no one has suggested that defendants in such cases may avail themselves of a *Brooke Group* defense only

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[6] *See, e.g.*, 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 112 (2d ed. 2000) ("the underlying antitrust goal [is] encouraging economic efficiency"); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993) ("[t]he purpose of the [Sherman] Act is . . . is to protect the public from the failure of the market"); *see also Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but is instead "comprehensive in its terms and coverage").

if they show that their price cuts will flow through to the ultimate consumers. If immediate consumer benefits were an antitrust end in themselves, unrelated to broader concerns about the efficient functioning of the market, this Court would not have observed recently that the "charging of monopoly prices" to consumers "is an important element of the free-market system" promoted by antitrust because the prospect of monopoly profits "induces risk taking that produces innovation and economic growth." *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

Just as principles of allocative efficiency favor rules that permit market incentives to produce lower prices in a concentrated retail market where the main seller is a monopolist, *see Brooke Group*, 509 U.S. at 223-224, 226-227, so too do they favor rules that permit market incentives to promote higher prices in a concentrated upstream market where the main buyer is a monopsonist. The common theme in either case is the need for rules that foster efficiently high levels of output. Also, in each case, the question is whether the defendant can be presumed to promote the efficient allocation of resources when it enters into a business arrangement that is profitable both for itself and for its trading partners (even if not for its competitors).

There is no reason to answer that question differently when the trading partners are suppliers of the inputs a defendant buys rather than retail customers of the finished products the defendant sells. *Brooke Group* provides the same answer in both contexts. Mutually beneficial arrangements between a firm and its trading partners should be categorically trusted to produce economically efficient outcomes, except where the firm incurs a loss in order to exclude rivals *and* enjoys a dangerous probability of recouping that loss as the result of excluding them.

Just as low retail prices benefit purchasers, high input prices benefit suppliers. Neither, however, threatens competition unless it leads to market power and recoupment. The second of the *Brooke Group* requirements is thus as im-

portant as the first, and as applicable to claims of buy-side predation as to ordinary sell-side predation. If a firm cannot subsequently recoup its losses through inefficient pricing practices, it cannot cause the economic harms that antitrust is designed to prevent: reduced output and deadweight loss. Put succinctly, "if the practice cannot end in a monopoly profit, there is no antitrust problem." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 28 (1984)).[7]

Second: By focusing single-mindedly on the upstream (buy-side) market, the Ninth Circuit overlooked the tendency of its competitor-protecting approach to produce, in the downstream (sell-side) market, the exact type of economic harms that antitrust policy is designed to prevent.

The crux of the plaintiff's grievance here is that Weyerhaeuser's willingness to pay more for sawlogs allowed it to buy more sawlogs, leaving fewer for the plaintiff to buy at its preferred price.[8] But the jury was not instructed to find, and did not find, that Weyerhaeuser wasted any of the sawlogs it bought. The logical upshot of the Ninth Circuit's holding that Weyerhaeuser bought too much, therefore, is this: Weyerhaeuser should have *restricted its output* in the downstream market for finished hardwood products, for that would have been the necessary result of reducing its purchase of inputs. Reductions in supply typically raise consumer prices, all else equal. *E.g.*, Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 94-96 (4th

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[7] Of course, even if a practice does "end in monopoly pofit," there might not be a problem. The *Brooke Group* tests are necessary but not sufficient requirements for antitrust liability.

[8] There can be no valid independent claim that Weyerhaeuser paid "too much" for a *given quantity* of sawlogs, even though the jury was permitted to predicate liability on such a finding. *See* Pet. App. 7a n.8. Even if Weyerhaeuser could have obtained the same quantity of sawlogs at a lower price—and there is no evidence that it could have—its paying more than that price would not have reduced the amount of sawlogs available to competitors or otherwise harmed them, let alone harmed competition.

ed. 2005). Thus, under the Ninth Circuit's analysis, Weyerhaeuser should have sold less to consumers and charged them more. It is difficult to imagine a result more at odds with sound antitrust policy.

The Ninth Circuit reached this perverse result because, in its competitive analysis, it ignored the downstream, "sell-side" market for finished hardwood lumber. But the welfare of that market is part and parcel of any analysis of Weyerhaeuser's conduct in the upstream, "buy-side" market for alder sawlogs. At least in a single-input, single-output context like this one, a claim of over-buying in the upstream market (buying inputs that a rival needs) normally collapses into a claim of over-selling in the downstream market (making sales that the rival wants). The gravamen of either claim is that the defendant is seeking unlawfully to "squeeze" a rival middleman's margins: to preclude the rival from earning a profit in the downstream market given the higher costs and reduced availability of inputs in the upstream market.

Indeed, the Ninth Circuit noted this connection between the upstream and downstream markets when it stated that, "[i]n a predatory buying scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases." Pet. App. 9a-10a. But the court then ignored the significance of that connection. If a firm can resell its purportedly excessive upstream purchases at a profit in the downstream market, its success "either reflects [its] lower cost structure . . . , and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks," *Brooke Group*, 509 U.S. at 223—in this case, risks of deterring economically efficient purchases and sales. It would flout basic antitrust objectives to impose liability on such a firm for "squeezing" its rival's margins. The threat of such liability would force the firm to cut production in the downstream market, to the detriment of its trading partners there, by reducing its acquisition of inputs in the upstream

market, to the detriment of its trading partners in *that* market too.

In these respects, the Ninth Circuit's analysis conflicts with *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), in which this Court implicitly recognized the importance of a unified buy-side, sell-side analysis in cases involving antitrust disputes between rival middlemen. There, the Court addressed the claim, similar to the plaintiff's claim here, that the defendant's market power "threaten[ed]" the plaintiff's "supply of [inputs in the upstream market] and its ability to compete" in the downstream market. *Id.* at 107. Specifically, the plaintiff alleged that the merger of two integrated beef packers would allow the resulting entity to "bid up the price it would pay for cattle, and reduce the price at which it [would sell] boxed beef," disadvantaging the plaintiff (also an integrated beef packer) in both the input and output markets. *Id.* at 114; *see also id.* at 108. The Court appropriately analyzed plaintiff's allegation as a single predatory pricing claim. *See id.* at 114-119. It did not compartmentalize its analysis into separate buy-side (upstream) and sell-side (downstream) inquiries, much less make the Ninth Circuit's mistake of focusing almost entirely on the buy-side market to the exclusion of the sell-side market.

The Court's conclusions in *Cargill* are instructive here. The parties had presented two possible standards for liability: "(1) a threat of a loss of profits stemming from the possibility that [the defendant], after the merger, would lower its prices to a level *at or only slightly above* its costs"; and "(2) a threat of being driven out of business by the possibility that [the defendant], after the merger, would lower its prices to a level *below* its costs." 479 U.S. at 114 (emphasis added). The Court found that only the latter theory—below-cost pricing—stated a proper antitrust claim. *Id.* at 114-119. Like *Brooke Group*, *Cargill* thus reaffirms that a middleman's purchases of inputs in an upstream market can be predatory only if the result is below-cost pricing (combined

with a dangerous probability of recoupment) in the sell-side market for finished products.[9]

Ironically, if the plaintiff here *had* alleged that Weyerhaeuser so "bid up" the price of sawlogs that it sold its finished lumber at a loss, the Ninth Circuit likely would have followed *Cargill* and required proof of below-cost pricing and likely recoupment. It is only because the plaintiff made no such allegation, *see* Pet. 5, that the Ninth Circuit felt free to ignore *Cargill* and *Brooke Group* and hold the plaintiff to an easier standard. It makes no sense, however, to hold plaintiffs alleging less culpable (or non-culpable) behavior to *less* rigorous standards for establishing liability.

II. THE COURT SHOULD REAFFIRM THE NEED FOR CLEAR AND OBJECTIVE STANDARDS IN ANTITRUST JURY INSTRUCTIONS

Quite apart from its substantive errors, the Ninth Circuit further erred in endorsing a jury instruction that lacks *any* determinate standard. That instruction permitted the jury to impose treble damages on any monopsonist that, in the jurors' subjective view, "purchased *more* [goods] than it needed" from input suppliers or "paid a *higher* price for [those goods] than necessary, in order to prevent the Plaintiffs from obtaining the [goods] they needed at a *fair* price." Pet. App. 7a n.8 (emphasis added). The instruction did not define any of the terms italicized above. They are not standards, but empty locutions. The Court should take this op-

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[9] The analysis might be more complex if a properly instructed jury finds that a defendant deliberately wasted inputs, *see generally American Tobacco Co.* v. *United States*, 328 U.S. 781, 803-804 (1946), although the defendant might plausibly argue that the *Brooke Group* test remains applicable even then and that the costs it incurred to purchase and dispose of those inputs should be taken into account in determining whether downstream market prices are sufficient to generate revenues in excess of the defendant's costs. As noted, that issue is not presented here because this jury did not make, and was not instructed to make, any finding that Weyerhaeuser wasted inputs during any relevant period.

portunity to reaffirm the need for the use of determinate standards in antitrust jury instructions.

A. Economic Rigor In Antitrust Law Requires Clear Standards In Jury Instructions

Since its decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court has repeatedly emphasized the need for bright-line, administrable principles to ensure that the antitrust laws are enforced "for 'the protection of competition not competitors.'" *Id.* at 488 (citation omitted). *Brooke Group* is itself a key illustration of this trend.[10]

A few critics of *Brooke Group* and other cases delimiting antitrust liability with bright-line principles have expressed concern that such principles can produce "false negatives": *i.e.*, individual cases in which, from the perspective of an omniscient economist, banning particular conduct in a given market would promote greater long-term consumer welfare than would non-intervention.[11] But a fundamental premise of modern antitrust analysis is that neither antitrust judges nor lay juries are omniscient economists.[12]

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[10] *See also Verizon Commc'ns*, 540 U.S. at 407 (placing strict limits on any obligation of monopolists to deal with rivals, and explaining that such limits are needed (among other reasons) to preserve efficient investment incentives for both the monopolists and their rivals); Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 931-932 n.7 (2001) (recent antitrust analysis "reflect[s] a series of emphatic post-*Alcoa* [*United States* v. *Alcoa*, 148 F.2d 416 (2d Cir. 1945)] statements by the Supreme Court that the antitrust laws protect competition in the sense of efficient business practices rather than in the sense of rivalry per se") (citing, *inter alia*, *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

[11] *See, e.g.*, Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941 (2002); *but see, e.g.*, Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—And The Implications For Defining Cost And Market Power*, 112 Yale L.J. 681 (2003) (explaining why criticism is unsound).

[12] *See, e.g.*, Hovenkamp, *supra* n.4, at 47 ("[T]here is relatively little disagreement about the basic proposition that often our general judicial

Bright-line principles are thus necessary both to preclude "false positives"—cases in which the antitrust laws ban conduct that, on balance, enhances total welfare—and to reduce market-distorting uncertainty about the extent to which lawful but aggressive competition, normally a core virtue in a capitalist economy, will subject a firm to treble damages under the antitrust laws.[13] As then-Judge Breyer explained long before *Brooke Group* was decided: "Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counterproductive, undercutting the very economic ends they seek to serve." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983). Put differently, clear, simple, and administrable antitrust rules may produce some false negatives, but the benefits of such rules outweigh the costs of trying to preclude all false negatives.[14]

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system is not competent to apply the economic theory necessary for identifying strategic behavior as anticompetitive."); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548, 629 (1969) ("[L]egal proceedings are simply not well adapted to sifting complex economic data and arriving at sound judgments on sophisticated economic questions."); *see also* Herbert Hovenkamp, *The Rationalization of Antitrust Law*, 116 Harv. L. Rev. 917, 942-943 (2003); Easterbrook, *supra* n.5, at 976-977.

[13] "One problem that haunts most antitrust litigation . . . is that vigorous competition may look very similar to acts that *undermine* competition and support monopoly power. The resulting danger is that the courts will prohibit, or the antitrust authorities will prosecute, acts that *appear* to be anticompetitive but that really are the opposite. The difficulty is that effective competition by a firm is always tough on its rivals." William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 425-426 (8th ed. 2000) (paragraph break omitted); *see also Spectrum Sports*, 506 U.S. at 458-459; Phillip E. Areeda, Louis Kaplow & Aaron Edlin, *Antitrust Analysis* 30 (6th ed. 2004); Hovenkamp, *supra* n.4, at 50.

[14] David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 80-88 (2005); Alden F. Abbott & Michael A. Salinger, *Learning from the Past: The Lessons of Vietnam, IBM, and Tying*, 2 Competition Policy Int'l 1, 6 (2006) ("Simple rules can be desirable even if they do not yield the correct result in every case in which they are applied—they

Open-ended jury instructions are just as counterproductive in this respect as opacity or imprecision in the substance of antitrust principles. Because antitrust principles are often difficult for nonspecialists to grasp, juries unconstrained by bright-line rules tend to decide cases on lay notions of fairness, which can diverge radically from sound antitrust principles.[15] Because each jury focuses narrowly on the parties to a given dispute, juries as a group systematically understate the costs of false positives—and the deterrent effect of the fear of false positives—on the economy as a whole. In short, imprecise instructions both distort outcomes in antitrust litigation and undermine the fundamental antitrust interest in clear rules and meaningful guidance to the business community.

B. The Instruction Approved Below Exemplifies The Inadequacy Of Many Jury Instructions In Antitrust Cases

The decision below upheld a jury instruction that dispensed not just with the clear rules established in *Brooke Group*, but with any other clear rule as well. As noted, that instruction permitted the jury to impose treble damages if,

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merely need to satisfy the criterion that overall welfare will be higher in the presence of the rule than in its absence."); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 313; Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 Geo. Mason L. Rev. 1, 22 (2003); Paul L. Joskow, *Transaction Costs Economics, Antitrust Rules, and Remedies*, 18 J.L. Econ. & Org. 95, 99-100 (2002) ("[T]he test of a good legal rule is not primarily whether it leads to the correct decision in a particular case, but rather whether it does a good job deterring anticompetitive behavior throughout the economy given all of the relevant costs, benefits, and uncertainties associated with diagnosis and remedies.").

[15] "Jurors have no interior compasses that help them determine which business practices are efficient. . . . To set the jury adrift on uncharted seas—and then to defer to whatever it does—is to introduce considerable risk into all business decisions. And for no good purpose." Easterbrook, *supra* n.5, at 979; *see also A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989).

in the jury's view, Weyerhaeuser's conduct placed rival buyers at an "unfair" disadvantage in getting what they "need." In that respect, the decision below is a throw-back to an earlier era of antitrust jurisprudence that this Court has sought to end: an era in which antitrust factfinders remained free to penalize a large company for conduct that they subjectively considered "unfair," irrespective of the long-term effect of those penalties on consumer welfare. *See, e.g., Spectrum Sports*, 506 U.S. at 459 ("The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics."). Antitrust instructions can degenerate into such standardless gibberish whenever, as in the decision below, lower courts decide to treat this Court's antitrust jurisprudence as permitting, outside narrowly defined classes of cases, decisions based on the unguided instincts of juries.

This case is not alone in that respect. Another case in point, for example, is the Third Circuit's controversial decision in *LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 542 U.S. 953 (2004). In that case, defendant 3M, a manufacturer of office supplies, offered its customers special discounts if they purchased bundles of its products, one of which—Scotch-brand tape—dominated sales of branded transparent tape. Plaintiff LePage's, a rival manufacturer of office supplies, challenged these bundled discounts as a "predatory" means of disadvantaging rivals in other markets. But the plaintiff could "not make a predatory pricing claim" under *Brooke Group* (324 F.3d at 151) because, despite the discount, the defendant continued to sell Scotch-brand tape "above its costs however costs [were] calculated" (*id.* at 147 n.5). And the plaintiff had dropped its claim for illegal tying early in the litigation because it could not meet the elements of tying: customers that rejected the bundled discount remained free to purchase Scotch tape by itself at commercially reasonable prices. *See id.* at 174 n.1 (Greenberg, J., dissenting, joined by Scirica and Alito, JJ.)

The Third Circuit nonetheless treated the plaintiff's failure to claim predatory pricing or tying as a basis for defaulting to a looser, totality-of-the-circumstances approach that disregards the affirmative policy goals underlying those established standards and permits each jury to apply its general sense of fair play to the facts of each individual case.[16] The extreme subjectivity of this approach is evident from the jury instructions the court approved on appeal from a verdict for the plaintiff. Those instructions told the jury that it could find liability if it determined that the defendant "engaged in predatory or exclusionary acts or practices"—defined as conduct that "tends to impair the opportunities of its rivals" and "either does not further *competition on the merits*, or does so in an *unnecessarily restrictive* way," such that it is "very difficult or impossible for competitors to engage in *fair competition*." 324 F.3d at 167-168 (emphasis added).

The Third Circuit found these instructions "thorough," "clear," and "sound." 324 F.3d at 169. They are none of those things. Without an economic definition, one juror's "competition on the merits" is another juror's "predatory or exclusionary act." And without objective economic guidance, jurors have no coherent basis for distinguishing between "unnecessarily restrictive" (or "unfair") practices and healthy competition. "'[F]airness' is a vagrant claim applied to any value that one happens to favor." 1 Areeda & Hovenkamp, *supra* n.6, ¶ 111d.

All too often, antitrust courts punt hard legal issues to the jury by means of such analytically empty instructions. In one recent case, for example, the Sixth Circuit ruled that a high-level economic dispute about how to measure "cost"

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[16] *See* 324 F.3d at 162-164; *see also id.* at 177-178 (Greenberg, J., dissenting, joined by Scirica and Alito, JJ.) ("I realize that the majority indicates that 'LePage's unlike the plaintiff in *Brooke Group*, does not make a predatory pricing claim.' But that circumstance *weakens* rather than *strengthens* LePage's's position as it merely confirms the lawfulness of 3M's conduct." (emphasis added; citation omitted)).

in a class of predatory pricing cases must be left to the case-by-case discretion of juries. The dispute in *Spirit Airlines, Inc.* v. *Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005), concerned how to draw an apples-to-apples comparison between price and cost in determining whether the defendant airline charged below-cost prices to "price-sensitive" passengers on particular routes. The district court ruled for the defendant. It observed that, if (as the plaintiff insisted) the relevant price figure were the average price charged to those *particular* customers instead of all passengers, then the relevant "cost" for antitrust purposes must be the incremental cost of serving those particular customers, rather than (as the plaintiff proposed) the average variable cost of serving *all* passengers. *See Spirit Airlines, Inc.* v. *Northwest Airlines, Inc.*, No. 00-71535, 2003 WL 24197742, at *19 (E.D. Mich. Mar. 31, 2003).

The Sixth Circuit reversed, holding that the "'intellectual disagreement' among the parties' experts" about "the appropriate measure of costs" should have been decided by the jury as a matter of fact. 431 F.3d at 945.[17] But the economic content of antitrust doctrine—such as which measure of cost a firm should take into account in deciding what prices it may charge—is a matter of law that should be decided by courts on a consistent basis from case to case. Here, the Sixth Circuit abdicated its responsibility to decide that issue of law by referring to the jury the "intellectual disagreement" between opposing economic theorists. As Professor Hovenkamp put it, "the worst possible outcome" a

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[17] In *Brooke Group*, this Court held that a price cannot be "predatory" unless it falls below an "appropriate measure" of the defendant's costs, but it did not define that "appropriate measure" because doing so was unnecessary to resolve that case. 509 U.S. at 222. Nothing in the Court's reasoning, however, suggests that this issue should be left to juries to resolve as a question of fact. Nor would that be a sensible result. The appropriate measure of costs in predatory pricing is a fundamental question of antitrust policy and is thus part of the legal standard, which is for a court to resolve. Whether a particular firm's prices exceeded the specified, relevant measure of costs is a question of fact for the jury.

court can order when confronting complex antitrust policy issues "is the one that too often obtains: the judge washes his hands of the matter and gives it to the jury, thus passing the issue off to an even less qualified decisionmaker." Hovenkamp, *supra* n.12, at 942-943.

Even apart from the relative competence of courts and juries to delimit antitrust liability with sound economic considerations, businesses need to know in advance, not after they have been subject to a treble-damages award, how vigorously they may compete against their competitors. Antitrust law will degenerate into an unprincipled crapshoot—and all large firms will err on the side of inefficient caution—until courts enforce consistent legal standards from one case to the next. There can be no such consistency until courts cabin the discretion of juries with clear instructions on basic principles of economics and law.

Widely used pattern jury instructions are not immune from these problems of analytical indeterminacy. As the Third Circuit noted, the vague jury instruction approved in *LePage's* (and discussed above) "closely followed the [1999] ABA sample instructions . . . as to predatory and exclusionary conduct, including its instructions distinguishing between procompetitive and anticompetitive conduct." 324 F.3d at 168; *see also Kinetic Concepts Inc.* v. *Hillenbrand Indus., Inc.*, 262 F. Supp. 2d 722 (W.D. Tex. 2003) (employing similarly standardless instructions); *cf.* ABA, Model Jury Instructions in Civil Antitrust Cases, at C-26 to C-30 (2005 ed.) ("ABA Instructions (2005)"). And the most recent ABA pattern instructions include a controversial charge for sell-side predatory pricing that, in its lack of objective standards, closely resembles the buy-side instruction in this case: It permits a jury to find a defendant liable if it charged prices above average variable cost (but below average total cost) and "sacrificed greater profits or took greater losses *than*

were necessary and did so in order *substantially to lessen or eliminate competition*." *Id.* at C-66 (emphasis added).[18]

These buzzwords provide no meaningful guidance to the jury. A firm that offers a discount to its customers often "sacrifices profits" in one sense or another. What, then, does it mean for a firm to sacrifice more profits "than necessary?" And necessary for what, exactly? The instruction does not say. Likewise, every for-profit company wishes to increase its sales at the expense of rivals, and indeed "a desire to *extinguish* one's rivals is entirely consistent with, often is the motive behind, competition." *A.A. Poultry Farms*, 881 F.2d at 1402 (emphasis added).[19] When then, if ever, should a firm

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[18] This ABA pattern instruction, based on the Ninth Circuit's pre-*Brooke Group* decision in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1036 (9th Cir. 1981), also reflects a substantively incorrect view of "cost." The ABA commentary itself remarks that "the continued viability of *Inglis* is unclear after *Brooke Group*." ABA Instructions (2005), at C-67. Most lower courts have read *Brooke Group* to preclude liability for predatory pricing whenever a defendant charges a price above incremental or avoidable cost (even if below average total cost). *See, e.g., Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999); *see generally* Phillip E. Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). And some courts rejected the *Inglis* rule even before *Brooke Group*. *See, e.g., Barry Wright*, 724 F.2d at 235-236. Nonetheless, the Sixth Circuit recently reaffirmed its adherence to a version of the *Inglis* standard, *see Spirit Airlines*, 431 F.3d at 937-938, and some courts in the Ninth Circuit have held that *Inglis* remains good law despite *Brooke Group*, *see Scripto-Tokai Corp.* v. *Gillette Co.*, No. CV-91-2862, 1994 WL 746072, at *3, *4 n.7 (C.D. Cal. Sept. 9, 1994).

[19] Likewise, jury instructions that condemn "willfulness," an "intent to vanquish rivals," or the like, *e.g.*, 3A Kevin F. O'Malley et al., *Federal Jury Practice and Instruction* § 150.31 (5th ed. 2001) ("The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless . . . the monopoly power was willfully and intentionally acquired and maintained."), are highly misleading because desirable procompetitive conduct is inherently designed to injure rivals by persuading their customers to shop elsewhere. *See, e.g.*, 3 Areeda & Hovenkamp, *supra* n.6, ¶ 651b; *see also United States* v. *Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.); *Olympia Equipment Leasing Co.*

be punished for adopting otherwise permissible price cuts if it does so "in order substantially to lessen or eliminate competition?"

All such instructions, including those in this case, not only invite false positives, but produce radically indeterminate results from one antitrust case to the next. Jurors may interpret them however they wish, to achieve whatever results they subjectively deem fair. No two juries (or jurors) will share the same intuitions about what is "fair," how much price competition is "necessary" in particular circumstances, and when large firms should leave on the kid gloves to give struggling competitors a better chance of success. Without standards to guide it, an antitrust jury becomes a black box. And any well-counseled firm will respond to this unpredictable threat of treble damages by pulling punches even when consumers would benefit from a competitive free-for-all.

This is no way for the federal appellate courts to superintend a critical business statute that affects all corners of the economy. The Court should take this opportunity to reaffirm the imperative for analytical rigor in all antitrust cases; for legal standards that take into account the costs of false positives; and for jury instructions that cabin jury discretion by clearly explaining applicable legal standards—explaining what it *means*, for example, for a price to be "too high," for the amount purchased to be "too much," or for a business practice to be "unfair."

CONCLUSION

The judgment below should be reversed.

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v. *Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir.) (Posner, J.), *supplemented on denial of reh'g*, 802 F.2d 217 (1986); Elhauge, *supra* n.2, at 268-269; Hovenkamp, *supra* n.4, at 177-178; Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* 192 (2003).

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